

FACTUAL HISTORY

On June 27, 2001 appellant, then a 50-year-old former machine operator, filed an occupational disease claim alleging that he sustained an employment-related hearing loss due to exposure to hazardous noise from compressors and other sources. He worked for the employing establishment from November 1979 to June 1986. Appellant submitted several audiograms, dated between 1979 and 1985, which detailed the progression of his hearing loss.

By letter dated December 31, 2001, the Office requested that appellant submit additional factual and medical evidence in support of his claim.

Appellant submitted a May 2001 audiogram and a statement which provided an additional description of his exposure to hazardous noise at work.

In early October 2002, the Office referred appellant to Dr. George Godwin, a Board-certified otolaryngologist, for otologic and audiologic testing and evaluation. In a report dated October 24, 2002, Dr. Godwin concluded that appellant had a bilateral neurosensory hearing loss which was not related to his federal employment.

By decision dated November 19, 2002, the Office denied appellant's claim on the grounds that the medical evidence did not establish that he had an employment-related hearing loss.

In a form dated January 10, 2006, appellant requested reconsideration of the Office's November 19, 2002 decision. He did not submit any evidence or argument in support of his reconsideration request.

By decision dated February 3, 2006, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant must file his or her application for review within one year of the date of that decision.² The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.³

The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. When an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."⁴ Office regulations and procedure provide that the Office

² 20 C.F.R. § 10.607(a).

³ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁴ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.⁵

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁶ The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.⁷ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁸ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁹ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁰ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.¹¹

ANALYSIS

Appellant filed an occupational disease claim alleging that he sustained an employment-related hearing loss due to exposure to hazardous noise from compressors and other sources. By decision dated November 19, 2002, the Office denied appellant's claim on the grounds that the medical evidence did not show that he had an employment-related hearing loss. By decision dated February 3, 2006, the Office denied appellant's request for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

In its February 3, 2006 decision, the Office properly determined that appellant filed an untimely request for reconsideration. Appellant's reconsideration request was filed in January 2006, more than one year after the Office's November 19, 2002 decision, and therefore he must demonstrate clear evidence of error on the part of the Office in issuing this decision.

⁵ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3d (January 2004). Office procedure further provides, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the [Office] made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error." *Id.* at Chapter 2.1602.3c.

⁶ See *Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁷ See *Leona N. Travis*, 43 ECAB 227, 240 (1991).

⁸ See *Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

⁹ See *Leona N. Travis*, *supra* note 7.

¹⁰ See *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

¹¹ *Leon D. Faidley, Jr.*, *supra* note 3.

Appellant has not demonstrated clear evidence of error on the part of the Office in issuing its November 19, 2002 decision. He did not submit positive, precise and explicit evidence which manifests on its face that the Office committed an error. In a form dated January 10, 2006, appellant requested reconsideration of the Office's November 19, 2002 decision, but he did not submit any evidence or argument in support of his reconsideration request. Therefore, there was no basis to find that appellant had clearly shown error in the Office's November 19, 2002 decision.

For these reasons, appellant did not submit evidence which raises a substantial question concerning the correctness of the Office's November 19, 2002 decision and the Office properly determined that he did not show clear evidence of error in that decision.

CONCLUSION

The Board finds that the Office properly refused to reopen appellant's case for further review of the merits of his claim on the grounds that his request was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' February 3, 2006 decision is affirmed.

Issued: October 10, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board